(16,806.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1898.

No. 247.

WILLIAM M. PRICE, ADMINISTRATOR OF HENRY C. MILLER, DECEASED, APPELLANT,

vs.

THE UNITED STATES AND THE OSAGE INDIANS.

APPEAL FROM THE COURT OF CLAIMS.

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JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., SEPTEMBER 16, 1898.

1 In the Court of Claims.

HENRY C. MILLER, JR., W. M. PRICE, Trustee for Stephen C. Price and Adele Price, and R. M. Reynolds, Public Administrator of Saline County, Missouri, and Administrator *de bonis non* in Charge of Estate of P. W. Thompson, Deceased, Plaintiffs,
vs.
THE UNITED STATES and THE OSAGE TRIBE of Indians, Defendants.

Indian Depredation. No. 6126.

I.—*Petition and Request for Judgment. Filed December* 14, 1891.

Whereas a claim, #1005, amounting to $13,000, for the payment of losses by Indian depredations has been heretofore filed in the Department of the Interior by H. C. Miller and Phillip W. Thompson; and whereas said claim has heretofore been approved and allowed by the Indian Office and the Secretary of the Interior in the sum of $8,200, in pursuance of the act of Congress making appropriations for the current and contingent expenses of the department and for fulfilling treaty stipulations with various Indian tribes for the year ending June 30th, 1886, and for other purposes, approved March 31st, 1885, and subsequent Indian appropriation acts, and reported to Congress by Executive Document, House of Representatives, # 122, of the 51st Congress, 1st session; and whereas it was found, approved, and allowed by the said Indian Office and the Secretary of
2 the Interior that of the said $8,200 the sum of $6,800 was to be paid to the legal representatives of H. C. Miller, and the remainder, $1,400, to the legal representatives of Phillip W. Thompson;

And whereas the said H. C. Miller is deceased; and whereas in his lifetime he conveyed by deed, duly executed, all his interest in and to the said claim to his son, Henry C. Miller, and to his grandchildren, Stephen C. and Adele Price; and whereas the said grandchildren are represented by their father, William M. Price, as trustee; and whereas the said Phillip W. Thompson is deceased; and whereas R. M. Reynolds, public administrator of Saline county, Missouri, has been appointed administrator *de bonis non* of the estate of the said Phillip W. Thompson, deceased; and whereas it is provided by the act approved March 3rd, 1891, entitled An act to provide for the adjudication and payment of claims arising from Indian depredations, that claims examined, approved, and allowed by the Secretary of the Interior or under his direction, etc., shall have priority of consideration, and judgment for the amount therein found to be due shall be rendered unless either the claimant or the United States shall elect to reopen the case and try the same before the court:

Now, therefore, the above-named plaintiffs, having duly considered the foregoing allegations, do elect not to reopen the case and try the same before the court, but ask that judgment for the amount

heretofore found to be due the said claimants as hereinbefore set forth, to wit, $8,200, shall be rendered in full of said claim
3 and divided between and paid to the said plaintiffs according to their respective interests; but in case the United States shall elect to reopen the case, the plaintiffs reserve the right to claim a larger sum than heretofore allowed.

Upon the trial hereof, death of the original claimants and proof of the plaintiffs' right to prosecute this action will be duly made to the court.

HENRY C. MILLER, JR.,
W. M. PRICE,
Trustee for Stephen C. Price and Adele Price, and
R. M. REYNOLDS,
Public Administrator of Saline County, Missouri, and
Administrator de Bonis Non of the Estate of
P. W. Thompson, Deceased,
By B. B. CUSHMAN, *Their Agent.*

B. W. PERKINS,
Att'y for Plaintiffs.

CITY OF WASHINGTON, }
District of Columbia, } *ss:*

B. B. Cushman, being duly sworn, deposes and says: I am the agent for the plaintiffs in this case. I have read the above petition and the matters therein stated are true to the best of my knowledge and belief.

B. B. CUSHMAN.

Subscribed and sworn to before me this 12th day of December, 1891.

[SEAL.] ALSON L. BAILEY,
Notary Public.

4 II.—*Proceedings in the Case.*

On April 24, 1895, the defendants filed their election to reopen the case, but thereafter, on May 2, 1895, they withdrew the same by leave of court.

Thereupon, to wit, on May 2, 1895, the defendants filed a motion to dismiss the case, but subsequently, to wit, on October 15, 1895, leave was granted them by the court to withdraw said motion to dismiss case, and to file in lieu thereof their demurrer to said original petition.

On March 23, 1896, the court made the following order sustaining the demurrer, to wit:

Demurrer sustained with leave to amend the petition on or before the first Monday in July, 1896, averring the citizenship of the parties whose property is alleged to have been taken or destroyed at the date thereof, and substituting the administrator of Henry C. Miller, deceased, as claimant in place of Henry C. Miller, Jr., and

of John M. Price, trustee, and setting out the full names and residence- of all the parties.

By the court:

WILLIAM A. RICHARDSON,
Chief Justice.

March 23, 1896.

5 III.—*Amended Petition. Filed April* 25, 1896.

Pursuant to the order of March 23, 1896, the claimants, on the 25th April, 1896, filed an amended petition, which is as follows:

In the Court of Claims.

WILLIAM M. PRICE, Administrator of Henry C. Miller, Deceased, and R. M. Reynolds, Public Administrator of Saline County, Missouri, and Administrator *de bonis non* of Phillip W. Thompson, Deceased, Plaintiffs, *vs.* THE UNITED STATES and OSAGE INDIANS, Defendants.	Indian Depredation Claim. No. 6126.

To the honorable the judges of the Court of Claims:

The amended petition of William M. Price, administrator *cum testamento annexo* of Henry C. Miller, deceased, and R. M. Reynolds, public administrator of Saline county, Missouri, and administrator *de bonis non* of Phillip W. Thompson, deceased, respectfully represents:

1. That they are citizens of the United States and residents of the State of Missouri.

2. That the said Henry C. Miller and Phillip W. Thompson, deceased, were at the time of the depredation hereinafter referred to and until the day of their death citizens of the United States and residents of the county of Saline, in the State of Missouri.

6 3. That in the spring of the year 1847 the said Henry C. Miller and Phillip W. Thompson started from their place of residence in the county of Saline, State of Missouri, with five wagons heavily laden with valuable goods and merchandise, together with 22 yoke of valuable oxen, bound for Santa Fé, New Mexico, at which place they designed to dispose of the same; that the said Henry C. Miller and Phillip W. Thompson had advanced on their way towards Santa Fé as far as a place called Diamond Springs, where they came up with a train of Government wagons under the command of Captain John G. Hayden, and they continued to travel with and under the protection of the Government train until they reached a stream in the Indian country called Pawnee fork, near the Arkansas river, at which place they, as well as aforesaid train of Government wagons, were detained on account of high water; that on or about the 23rd day of June, 1847, while being then and

there detained, as aforesaid, a party of seven Indians came to their encampment, while some 70 or 80 other Indians remained at a short distance. The said Indians were Osage Indians belonging to a tribe at amity with the United States. They conversed with some of the company who could speak the Osage language and said they were on a hunt up the Pawnee fork. Said Indians then left the camp, but returned on the following morning, to wit, the 24th of June, 1847, at which time they made an attack on the stock belonging to the said Henry C. Miller and Phillip W. Thompson, wounding one yoke of the oxen; that the said Indians made another and further attack on the said stock on the morning of the 26th of June, 1847, while the said Henry C. Miller and Phillip W.
7 Thompson were in camp on a stream called Coon creek, near the Arkansas river, and that the said Indians then and there took from and drove off twenty and one-half yoke of the oxen belonging to the said Henry C. Miller and Phillip W. Thompson, as well as many yoke of oxen belonging to the Government train before mentioned; that owing to the loss of their oxen the said Henry C. Miller and Phillip W. Thompson were left wholly without the means of either getting their goods on to Santa Fé or getting them back to the States, being left, as they were then, with only one and one-half yoke of oxen and in the midst of an uninhabited and wilderness country; that the said oxen, wagons, and contents belonged jointly to the said Henry C. Miller and Phillip W. Thompson, the said Henry C. Miller being the owner of four-fifths of the same and the said Phillip W. Thompson being the owner of one-fifth; that the said goods, wagons, and oxen were worth at least $15,000 at the place where they then were if the said Henry C. Miller and Phillip W. Thompson had possessed the means of getting them to Santa Fé, but, being left without any positive means of conveyance of the said goods, they were compelled to sell them to a Mr. Romans, a Santa Fé trader, for less than $2,000, thereby sustaining a loss of over $13,000; that the said Henry C. Miller and Phillip W. Thompson immediately made application to see Major Harvey, the superintendent of Indian affairs in Saline county, Missouri, who declined to take jurisdiction of the case on the ground that the offense was not committed within his superintendency;
8 that the said Henry C. Miller and Phillip W. Thompson then proceeded to take depositions and proofs in the premises and forwarded them to the Honorable D. R. Atchison, then a Senator from the State of Missouri in the Congress of the United States, but the said Atchison returned the papers to the said H. C. Miller and Henry W. Thompson, with the information that the claim could not be presented to Congress until it had been submitted to the superintending agent or subagent having jurisdiction thereof; that the said Henry C. Miller and Phillip W. Thompson then furnished to Mr. Richardson, United States agent of the Osage Indians, the documents in proof of the facts, but he resigned his office about the time of receiving said documents and handed them over to his successor in office, Andrew J. Dorn, of Ohio, who presented same to the Indians of the Osage tribe in council, but they

neglected and refused to make satisfaction for the same; that the said Henry C. Miller and Phillip W. Thompson, having failed to obtain the redress to which they were entitled, introduced their memorial in Congress, but, no final action having been taken thereon, the said Henry C. Miller and Phillip W. Thompson subsequently filed their claim in the Interior Department, which, after thorough examination, was approved on the 13th of December, 1889, when the Secretary of the Interior awarded the sum of $8,200 in full satisfaction of said claim—$6,800 to be paid to the legal representatives of Henry C. Miller, and $1,400 to be paid to the legal representatives of Phillip W. Thompson; that they are unable to make more certain and distinct allegations as to the character of the goods lost and their value, because after diligent search they have not been able to find the inventories of the property
9 and affidavits of the witnesses, now dead, which, as they are informed, accompanied the original petition.

4. Your petitioners are advised that, inasmuch as the said claim has been heretofore approved and allowed by the Indian Office and by the Secretary of the Interior in the sum of $8,200, in pursuance of the act of Congress making appropriations for the current and contingent expenses of the department and for fulfilling treaty stipulations with various Indian tribes for the year ending June 30, 1886, and for other purposes, approved March 31, 1885, and subsequent Indian appropriation acts, and reported to Congress in Executive Document, House of Representatives, 122 of the 51st Congress, 1st session, and inasmuch as it was found by said Secretary of the Interior that the sum of $8,200 was justly due, the sum of $6,800 to be paid to the legal representatives of the said Henry C. Miller and the sum of $1,400 to be paid to the legal representatives of the said Phillip W. Thompson, and inasmuch as it is provided by act of Congress, approved March 3, 1891, entitled An act "to provide for the adjudication and payment of claims arising from Indian depredation," that claims examined, approved, and allowed by the Secretary of the Interior shall have priority of consideration, and judgment for the amount therein found to be due shall be rendered, unless either the claimant of the United States shall elect to reopen the case and try the same before the court, and the said plaintiffs electing not to reopen the said case and try the same before the court, that they are entitled to judgment for the amount heretofore found to be due as hereinbefore set forth. They therefore
10 ask that judgment for the sum of $8,200 shall be rendered by the court in full satisfaction of said claim and paid to the said plaintiffs according to their respective interests, to wit: $6,800 to your petitioner William M. Price, as administrator of the said Henry C. Miller, deceased, and $1,400 to your petitioner R. M. Reynolds, public administrator of Saline county, Missouri, and administrator *de bonis non* of Phillip W. Thompson, deceased.

5. Your petitioners present herewith a certified copy of the order made by the probate court of Saline county, Missouri, on the 23rd of November, 1891, ordering that Robert M. Reynolds, public administrator, take charge of and manage the unadministered estate of

Phillip W. Thompson, deceased, and also a certified copy of the appointment and qualification of the said William M. Price as administrator *cum testamento annexo* of the estate of the said Henry C. Miller, deceased.

Very respectfully, WM. M. PRICE,
Administrator cum Testamento Annexo
Henry C. Miller, Dec'd.
R. M. REYNOLDS,
Public Administrator of Saline County, Missouri,
and Administrator de Bonis Non of
Phillip W. Thompson, Deceased.

JOHN GOODE,
Att'y for Complainants.

STATE OF MISSOURI, }
City of St. Louis, } *ss:*

William M. Price, being duly sworn, upon oath says that he is the administrator *cum testamento annexo* of Henry C. Miller, Senior, deceased, late a resident of Saline county, Missouri, one of
11 the above-named petitioners, and that the facts set forth in said amended petition are true as he verily believes.

WM. M. PRICE.

Sworn and subscribed before me this 20th day of April, 1896.

[SEAL.] JOHN F. GREEN,
Notary Public, City of St. Louis.

IV.—*Further Proceedings in the Case.*

On December 17, 1896, the defendants filed a demurrer to the amended petition.

On the 15th of February, 1897, the court made an order overruling said demurrer.

On the 8th of April, 1897, the defendants filed their election to reopen the case.

On the 9th day of June, 1897, the defendants filed a general traverse, to wit:

General Traverse.

Now comes the assistant attorney general, on behalf of the defendant Indians and the United States, and, answering the petition of the claimants herein, denies each and every allegation therein contained, and asks judgment that the petition be dismissed.

JOHN G. THOMPSON,
Assistant Attorney General.

12 V.—*Findings of Fact (as Amended) and Conclusion of Law in the Case of William M. Price, Administrator of Henry C. Miller, Deceased.*

This case having been heard by the Court of Claims, the court, upon the evidence, finds the facts as follows:

I.

At the time of the depredation hereinafter stated, claimant's decedent, Henry C. Miller, was a citizen of the United States and a resident of the State of Missouri, where claimant now resides.

II.

On the 26th day of June, 1847, near the Arkansas river, on the route from western Missouri to Santa Fé, at a place in what is now the State of Kansas, Indians belonging to the Osage tribe took and drove away 32 head of oxen, the property of said decedent, which at the time and place of taking were reasonably worth the sum of four hundred dollars ($400).

At the time said oxen were taken they were being used by said decedent in the transportation of goods along the route aforesaid, and in consequence of such taking decedent was compelled to abandon the trip and to sell his portion of said goods and four (4) wagons belonging to him for the sum of one thousand two hundred dollars ($1,200).

The goods and wagons of said decedent at the time of the depredation were reasonably worth the sum of seven thousand six hundred dollars ($7,600).

Said property was taken as aforesaid without just cause or provocation on the part of the owner or his agent in charge and has not been returned or paid for.

III.

At the time of said depredation said defendant Indians were in amity with the United States.

IV.

A claim for the property so taken was presented to the Interior Department in June, 1872, and evidence was filed in support thereof.

Conclusion of Law.

Upon the foregoing findings of fact the court decides as a conclusion of law that the claimant is entitled to recover judgment against the United States and the Osage tribe of Indians in the sum of four hundred dollars ($400), out of which amount the sum of eighty dollars is to be paid to John Goode, Esq., as attorney's fees.

The petition as to the claim for goods and wagons belonging to claimant's decedent and disposed of as set forth in finding II is dismissed for want of jurisdiction.

13 VI.—*Opinion of the Court.*

WELDON, J., delivered the opinion of the court:

The petition embraces two claims of different parties, having distinct and separate interests, and therefore separate judgments will be rendered on the claim of each. In the year 1847, the decedent Henry C. Miller and the decedent Philip W. Thompson, both being native-born citizens of the United States, were owners in severalty of 44 head of oxen, 5 wagons, and a large amount of dry goods.

While they were so possessed the defendants The Osage Indians, then being in a state of amity with the United States, attacked the train of said decedents and took from their possession about 40 head of said oxen, drove them away, and they became lost to the decedents.

The depredation was committed on the 26th of June of said year near the Arkansas river, on the route from western Missouri to Santa Fé. In consequence of the taking of the cattle the parties were compelled to abandon their trip, and were forced to sell the goods at a much less price than their cost and their value at the point of destination. The property belonged in the proportion of four-fifths to Miller and one-fifth to Thompson. The claim was presented to the Interior Department in June, 1872, and on December 13, 1889, the Secretary of the Interior recommended an allowance of $8,250, which was not paid. In the amount is embraced the loss on the goods.

The claimants brought suit on the allowance of the Secretary, but the defendants elected to reopen the case, contesting it on the ground that the allowance of the Secretary was erroneous as to the loss on the goods. The defendants have not by the introduction of new evidence, sought to attack the claim upon the whole case; but upon the specific ground that the allowance is based upon an erroneous construction of the law as to the extent of the claimants' right of recovery.

A demurrer was filed to the original petition, which was sustained and leave given to amend, an amended petition was filed on the 26th of April, 1896, and to the amended petition a demurrer was also filed, which was overruled. The cause was tried on the amended petition and plea to the merits. By the allegations of the amended petition the suit is brought on the award of the Secretary of the Interior, and being so founded it is not necessary that the petition allege matters of fact which constituted the original claim. It is sufficient if the petition shows with reasonable certainty the finding and award of the Secretary.

It was contended in the argument on the demurrer that the petition was defective in not alleging that the depredation was committed "without just cause or provocation on the part of the
14 owner or agent in charge and not returned or paid for."

The court said informally in substance in overruling the demurrer, if the decedents provoked the Indians to commit the depredation so as to relieve them from responsibility, that is a defense on

he merits; but as we are advised by the form of the petition we should hold that it was not the fault of the decedents that the depredation was committed. As to the want of an allegation that the property had not been returned or paid for, that question can only be reached on the merits of the cause should it be reopened by the election of the defendants.

In the argument of the first demurrer it was contended by counsel for the claimant, that inasmuch as the defendants had not elected to reopen the cause, they had no right to interpose objections to the sufficiency of the petition; but the court held, that the defendants had a right to interpose a demurrer without first exercising the right to reopen. Although the merits of the claim cannot be attacked except by a reopening by the defendants when the suit is based upon the award of the Secretary, they have a right to interpose objections to the sufficiency of the petition and try by demurrer the legal question whether upon the showing of the petition there is a right of recovery.

In this case the defendants not abiding by their demurrer, have filed an election to reopen; but have not introduced additional evidence, so that the case is to be decided on the evidence filed in the Department on which the Secretary based the award.

The act of 1891, (26 Stat. L., 851) provides as to cases determined by the Secretary that they "shall have priority of consideration by such court, and judgment for the amount therein found due shall be rendered unless either the claimant or the United States shall elect to reopen the case and try the same before the court, in which event the testimony given by the witnesses and the documentary evidence, including reports of the department agents therein, may be read as depositions and proofs. Provided, that the party electing to reopen the case shall assume the burden of proof."

The effect of this provision of the statute is, that the party electing to abide by the finding of the department has a *prima facie* right of recovery or defense, and the award must stand in favor of such party unless it is shown by the party reopening the case that the award is erroneous either in fact or in law. The burden of proof is an appreciable quantity in judicial determination, in this, that one of the parties has a *prima facie* right of recovery, and unless that right is overcome by the introduction of proof it must prevail. The right may be very frail in its character, but it is sufficient to base a recovery upon as long as it is not successfully assailed. The statute does not imply that the burden of proof involves a necessity and obligation upon the part of the party reopening the case to introduce new and additional evidence to that which is on file in the department, but leaves it open to implication that the case may be determined on the evidence on file, and upon that evidence the court may decide that the award of the Secretary is erroneous either in fact or in law. Congress in the enactment of the law may have properly assumed, that in a majority of cases the party presented all his testimony to the department, as that is the usual practice in the pre-

sentation of claims and demands for adjustment either to a court or to an arbitration; and therefore to limit the jurisdiction of the court to cases in which additional evidence is introduced would be to circumscribe the power of the court in violation of the purpose and intent of Congress. It is said in substance in the case of *Wolverton* (29 C. Cls. R., 19) that the award of the Secretary of the Interior will not be lightly disturbed by the court on the same evidence. See also *Montoya Case* (32 C. Cls., 71).

The burden of proof therefore requires, that the party reopening the case shall adduce to the court a substantial reason either in fact or in law why the award of the Secretary should be reversed in whole or in part. It is said in substance in the case of *Cox* (29 C. Cls. R., 349) that when the defendants elect to reopen a case they may set up any defenses which might have been set up in the Interior Department. Under that construction of the law the jurisdiction of the Secretary may be raised by the defendants either as to a part or the whole of a claim.

The defendants contest the right of the claimant to recover on the award of the Secretary on the ground, that in the allowance he included the difference between the value of the goods and the price at which the decedents were compelled to sell.

If this were a proceeding at common law against an ordinary wrongdoer in the form of an action *ex delicto*, the right to recover to the full extent of the injury inflicted, including direct and consequential damages, would be clear and unquestionable; but it being a proceeding under a statute the phraseology of which limits the extent of the recovery, and the consequent right of recovery, the rule is different. The property actually taken in the depredation was the oxen, and the damages incident to the rest of the property were the consequential results of such taking.

The first law of Congress affecting the intercourse of the Indians and the citizens of the United States was passed on the 22d day of July, 1790 (1 Stat. L., 137), and continued for the space of two years. The purpose of that act was to protect the Indians against the encroachments of the whites, by providing severe penalties against them for the commission of certain offenses within the territory of the Indians.

The next act affecting the Indian tribes was passed on the 3d of March, 1793 (1 Stat. L., 329), and is entitled "An act to regulate trade and intercourse with the Indian tribes." This act, as its title indicates, regulates the trade and intercourse with Indians, but contains no provision as to depredations by the Indians on the property of the citizens. This statute continued in force for two years from the 1st of March, 1793.

After the expiration of the act of March, 1793, there was no law regulating or defining the rights of the Indians and the duties of the citizens until the passage of the law of May 19, 1796 (1 Stat. L., 469), entitled "An act to regulate trade and intercourse with Indian tribes and to preserve the peace on the frontier."

The title of this act indicates a broader purpose and policy than the former statute in providing obligations and liabilities on the

part of the Indians. In the fourteenth section of the act it is enacted "that if any Indian or Indians belonging to any tribe in amity with the United States shall come over or cross the said boundary line into any State or Territory inhabited by citizens of the United States and there take, steal or destroy any horse, horses, or
16 any other property belonging to any citizen or inhabitant of the United States * * * or shall commit murder, violence, or outrage upon any such citizen or inhabitant, it shall be the duty of such citizen or inhabitant * * * to make application to the superintendent or such other person as the President of the United States shall authorize for that purpose," who upon such notice are by the terms of the law required to do certain acts in order to obtain satisfaction from the Indian tribe or nation to which the offending Indian belonged.

The provisions of the act of 1796, re-enacted March 3, 1799 (1 Stat. L., 747), and March 30, 1802 (2 Stat. L., 139), continued to be the law regulating intercourse and trade with the Indians until the year 1834, when the act entitled "An act to regulate trade and intercourse with the Indian tribes and to preserve peace on the frontier" (4 Stat. L., 729) was enacted. The title of this act is the same as that of 1796, and it is much more elaborate in its provisions, but the same in substance in many particulars.

By the seventeenth section of the act of 1834, which is similar to the fourteenth section of the former act, it is in substance provided, that if any Indian whose tribe is in amity with the United States shall within the Indian country "take or destroy the property" of any person within such country, or shall pass from the Indian country into any State or Territory inhabited by citizens of the United States and "there take, steal, or destroy horses or other property" belonging to a citizen or inhabitant, upon that condition of fact certain steps shall be taken upon the part of the owner looking to his indemnification, as provided by the act.

The statute of 1796, the statute of 1834, and the statute of 1891, employ substantially the same words in defining the character of the depredations for which satisfaction is to be made. The first two are identical in language, and the last does not differ from them in substance.

The statute of 1891, provides as its first and fundamental grant of power that the court shall have jurisdiction, first, "All claims for property of citizens of the United States taken or destroyed by Indians belonging to any band, tribe, or nation in amity with the United States without just cause or provocation on the part of the owner or the agent in charge and not returned and paid for."

In the case of *Friend* (29 C. Cls. R., 425) it is said: "It is apparent that the act relates exclusively to the claims for property of citizens of the United States taken or destroyed by Indians, etc., as set forth in the first paragraph. That idea runs through all the rest of the act." It is true that in that case the grievance related to a personal injury for which the court held there could be no recovery.

The depredation which Congress intended to afford a remedy for by the act of 1891, is limited by the words "taken or destroyed,"

and is, therefore, necessarily circumscribed by that limitation to property which has been absolutely lost, either by theft or destruction. The act was not intended to cover consequential damages, which might have ensued to a claimant as an incident to the raid on his property, and for which there might be a recovery against a wrongdoer at common law. The court, in the construction of that section of the statute, has confined the liability of the defendants to the value of the property actually taken or destroyed, and has not allowed consequential damages resulting from the commission of the depredation.

In the case of *Brice v. The United States and the Cheyenne and Arapahoe Indians* (32 C. Cls., 23), it is said in reference to the act of 1834, "the Secretary of the Interior had no authority to adjust and allow a claim for consequential damages growing out of the taking of property, and was therefore confined to the consideration of the claim for the value of the mules alleged to have been stolen."

In this case, so far as the raid of the Indians affected the condition, the goods of claimants were untouched; they remained intrinsically so far as condition is concerned in the same state that they were antecedent to the raid and depredation of the defendant Indians.

The effect of the raid was not to destroy or damage the property by diminishing its quality or its quantity; but had the consequential effect of diminishing its value by producing a condition the effect of which was to decrease its commercial worth in precipitating its sale at a place where there was no market in the form of competition.

They did not take or destroy the property of the claimant, but deteriorated its value as the incidental and consequential result of their raid. The court decides that the claimant is entitled to recover the value of the oxen, but no allowance is made for the damages to the goods for the reasons stated in the foregoing opinion.

17 VII.—*Judgment in the Case of William M. Price, Adm'r of Henry C. Miller, Dec'd, No.* 6126, *Indian Depredations.*

At a Court of Claims held in the city of Washington on the 6th day of December, A. D. 1897, judgment was ordered to be entered up as follows:

The court, upon due consideration of the premises, find in favor of the claimant, and do order, adjudge, and decree that the said claimant, William M. Price, as administrator of Henry C. Miller, deceased, do have and recover of and from the United States and the Osage tribe or nation of Indians, committing the wrong for which this judgment is rendered, the sum of four hundred dollars ($400), of which sum there is allowed John Goode, Esquire, the claimant's attorney, for prosecuting said claim, the sum of eighty dollars ($80), fixed by the court according to the provisions of the act of March 3, 1891, chapter 538, section 9 (1, Supplement of Revised Statutes, 2d edition, pages 915, 916). The petition as to the

claim for goods and wagons, as set forth in the findings, is dismissed.

BY THE COURT.

A true copy of record.

18 VIII.—*Application for and Allowance of Appeal.*

WILLIAM M. PRICE, Administrator of Henry C. Miller, Deceased, *vs.* THE UNITED STATES and THE OSAGE INDIANS. } No. 6126. Indian Depredation.

From the judgment rendered in the above-entitled cause, on the 6th day of December, 1897, in favor of the claimant, the claimant, by his attorney, on the 29th day of January, 1898, makes application for and gives notice of an appeal to the Supreme Court of the United States.

JOHN GOODE,
Attorney for Claimant.

Filed January 29, 1898.

On the 14th day of February, 1898, it is ordered that the aforesaid application for appeal be allowed as prayed for.

BY THE COURT.

19 In the Court of Claims.

WILLIAM M. PRICE, Administrator of Henry C. Miller, Deceased, *vs.* THE UNITED STATES. } No. 6126. Indian Depredation.

I, John Randolph, assistant clerk of the Court of Claims, do hereby certify that the foregoing are true transcripts of the pleadings in the above-entitled cause, of the findings of fact by the court and the conclusion of law thereon, of the opinion of the court, of the application for and allowance of appeal to the Supreme Court of the United States.

Seal Court of Claims.

In testimony whereof I have hereunto set my hand and affixed the seal of said court, at Washington, this 19th day of February, 1898.

JOHN RANDOLPH,
Ass't Clerk Court of Claims.

Endorsed on cover: Case No. 16,806. Court of Claims. Term No., 247. William M. Price, administrator of Henry C. Miller, deceased, appellant, *vs.* The United States and The Osage Indians. Filed February 21st, 1898.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1898.

WILLIAM M. PRICE, Administrator of HENRY C. MILLER, deceased, *Appellant*, *vs.* THE UNITED STATES and the OSAGE INDIANS.	}	No. 247.

Appeal from the Court of Claims.

STATEMENT AND BRIEF FOR APPELLANT.

Statement.

This is an appeal from a judgment of the Court of Claims on the Indian depredation claim of appellant under the act of Congress of March 3, 1891, entitled "An act to provide for the adjudication and payment of claims arising from Indian depredations."

The claim was made by appellant as the representative of Henry C. Miller, a citizen of the United States, on account of a depredation of the Osage Indians, then at amity with the United States, in 1847. Prior to the passage of the act of 1891, the claim had been pending in the Interior Department for several years, and had been allowed by the Secretary of the Interior after a full investigation of the Indian Department, in the sum of six thousand eight hundred dollars ($6800) to appellant as the representative of Henry C. Miller, and one thousand four hundred dollars ($1400) to the representative of Philip W. Thompson. These judgments were reduced by the Court of Claims in the case of Miller to four hundred dollars ($400) and in the case of Thompson to one hundred dollars ($100.)

In the Court of Claims the government elected to reopen the case and filed a general traverse (Rec., p. 6), but introduced no new evidence.

The government therefore assumed the burden of proof, and as it introduced no new testimony the case was decided, as required by the statute, upon the proofs taken by the Internal Department, the claim being one which had been "examined, approved and allowed" by the Secretary of the Interior.

The undisputed facts which were found by the Court of Claims in its findings of facts, as well as stated in its opinion, are as follows:

In the year 1847, Henry C. Miller and Phillip W. Thompson, citizens of the United States and residents of the County of Saline in the State of Missouri, started from their residence with five (5) wagons heavily laden with valuable merchandise and twenty-two yoke of oxen, bound for Santa Fe, New Mexico, where they intended to dispose of their merchandise. On the 26th of June 1847, when they were in camp on the stream called Coon creek, near the Arkansas river, on the route from west-

ern Missouri to Santa Fe, they were attacked by a band of Osage Indians, then at amity with the United States, without any cause or provocation, and twenty and one-half yoke of oxen were driven away. Being thus left with only one and a half yoke of oxen in a wilderness and uninhabited country, Miller and Thompson were without any means of transporting their goods, and they were therefore compelled to sell the goods and wagons to a trader for less than two thousand dollars; this sum being but a fraction of their value. Miller and Thompson immediately made application to the local Superintendent of Indian Affairs, who took their depositions and proofs; they then made an unsuccessful appeal to the Osage Indians in council, and to Congress, and finally filed their claim in the Interior Department where, after thorough investigation by the Indian Department, it was allowed, as above stated, by the Secretary of the Interior, December 13, 1889.

These facts were recited substantially by the Court of Claims in its opinion, (See Rec., p. 8.) Thus the court says:

"The claim was presented to the Interior Department "in June 1872, and on December 13, 1889, the Secretary "of the Interior recommended an allowance of eight "thousand two hundred and fifty dollars ($8250), (that "is for both Miller and Thompson) which was not paid. In "the amount is embraced the loss on the goods. The "claimants brought suit on the allowance of the secretary, "but the defendants elected to reopen the case, contesting it on the ground that the allowance of the Secretary "was erroneous as to the loss on the goods. The defendants have not by the introduction of new evidence "sought to attack the claim upon the whole case, but upon "the specific ground that the allowance is based upon an "erroneous construction of the law as to the extent of the "claimants' right of recovery."

The case therefore turned on the single question whether the claimants on the admitted facts could recover

the admitted loss sustained in consequence of the destruction of the means of transportation of their property in the wilderness. The Court of Claims held that they could only recover the value of the oxen actually taken, and that the loss on the value of their property thus necessitated was not a "taking" or "destruction" within the meaning of the act. The Court of Claims, therefore, reduced the finding of Miller from six thousand eight hundred to four hundred dollars, and that of Thompson from one thousand four hundred to one hundred dollars, the reduced figures being the interest of each in the oxen driven away. The court's findings of facts and conclusions of law are as follows (Rec., p. 7):

"This case having been heard by the Court of "Claims, the court, upon the evidence, finds the facts as "follows:

I.

"At the time of the depredation hereinafter stated, "claimant's decedent, Henry C. Miller, was a citizen of "the United States and a resident of the State of Missouri "where claimant now resides.

II.

"On the 26th day of June, 1847, near the Arkansas "river, on the route from Western Missouri to Santa Fe, "at a place in what is now the State of Kansas, Indians "belonging to the Osage tribe took and drove away thirty-"two head of oxen, the property of said decedent, which "at the time and place of taking were reasonably worth "the sum of four hundred dollars ($400).

"At the time said oxen were taken they were being "used by said decedent in the transportation of goods "along the route aforesaid, and in consequence of such "taking decedent was compelled to abandon the trip and "sell his portion of said goods and four (4) wagons "belonging to him for the sum of one thousand two hun-"dred dollars ($1200).

"The goods and wagons of said decedent at the time "of the depredation were reasonably worth the sum of "seven thousand six hundred dollars ($7600).

"Said property was taken, as aforesaid, without "just cause or provocation on the part of the owner or his "agent in charge and has not been returned or paid for.

III.

"At the time of said depredation said defendant "Indians were in amity with the United States.

IV.

"A claim for the property so taken was presented to "the Interior Department in June, 1872, and evidence was "filed in support thereof."

Conclusion of Law.

"Upon the foregoing findings of fact the court decides "as a conclusion of law, that the claimant is entitled to "recover judgment against the United States and the "Osage tribe of Indians in the sum of four hundred dol- "lars ($400), out of which amount the sum of eighty "dollars is to be paid to John Goode, Esq., as attorney's "fees.

"The petition as to the claim for goods and wagons "belonging to claimant's decedent and disposed of as set "forth in finding II is dismissed for want of jurisdiction."

The administrator of Miller therefore appeals to this court, while the claim of Thompson, not being of the jurisdictional amount for appeal, is held in the Court of Claims abiding the result of this appeal.

The Statute.

As the judgment of the Court of Claims was based upon its view of its jurisdiction under the Act of 1891,

for the convenience of the court, we here set out that Act in full:

[PUBLIC—139.]

An act to provide for the adjudication and payment of claims arising from Indian depredations.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled—That in addition to the jurisdiction which now is, or may hereafter be, conferred upon the Court of Claims, said court shall have and possess jurisdiction and authority to inquire into and *finally adjudicate*, in the manner provided in this act, all claims of the following classes, namely:

First. All claims for property of cittzens of the United States taken or destroyed by Indians belonging to any band, tribe, or nation, in amity with the United States, without just cause or provocation on the part of the owner or agent in charge and not returned or paid for.

Second. Such jurisdiction shall also extend to all cases which have been examined and allowed by the Interior Department and also to such cases as were authorized to be examined under the act of Congress making appropriations for the current and contingent expenses of the Indian department, and for fulfilling treaty stipulations with various Indian tribes for the year ending June thirtieth, eighteen hundred and eighty-six, and for other purposes, approved March third, eighteen hundred and eighty-five, and under subsequent acts, subject however, to the limitations hereinafter provided.

Third. All just offsets and counter claims to any claim of either of the preceeding classes which may be before such court for determination.

SECTION 2. That all questions of limitations as to time and manner of presenting claims are hereby waived, and no claim shall be excluded from the jurisdiction of the court because not heretofore presented to the Secretary of the Interior or other officer or department of the Government: *Provided*, That no claim accruing prior to July first, eighteen hundred and sixty-five, shall be considered by the court unless the claim shall be allowed or

has been or is pending, prior to the passage of this act before the Secretary of the Interior or the Congress of the United States. or before any superintendent, agent sub-agent or commissioner, authorized under any act of Congress to enquire into such claims; but no case shall be considered pending unless evidence has been presented therein: *And provided further*, That all claims existing at the time of the taking effect of this act shall be presented to the court by petition, as hereinafter provided, within three years after the passage hereof. or shall be thereafter forever barred: *And provided further*, That no suit or proceeding shall be allowed under this act for any depredation which shall be committed after the passage thereof.

SECTION 3. That all claims shall be presented to the court by petition setting forth in ordinary and concise language, without unnecessary repetition, the facts upon which such claims are based, the persons, classes of persons, tribe or tribes, or band of Indians by whom the alleged illegal acts were committted, as near as may be, the property lost or destroyed, and the value thereof, and any other facts connected with the transactions and material to the proper adjudication of the case involved. The petition shall be verified by the affidavit of the claimant, his agent, adminstrator, or attorney, and shall be filed with the clerk of said court. It shall set forth the full name and residence of the claimant, the damages sought to be recovered, praying the court for a judgment upon the facts and the law.

SECTION 4. The service of the petition shall be made upon the Attorney-General of the United States in such manner as may be provided by the rules or orders of said court. It shall be the duty of the Attorney-General of the United States to appear and defend the interests of the Government and of the Indians in the suit, and within sixty days after the service of the petition upon him, unless the time shall be extended by order of the court made in the case, to file a plea, answer or demurrer on the part of the Government and the Indians, and to file a notice of any counterclaim, set-off, claim of damages, demand, or defense whatsoever of the Government or of the Indians in the premises: *Provided*, That should the

Attorney-General neglect or refuse to file the plea, answer, demurrer, or defense as required, the claimant may proceed with the case under such rules as the court may adopt in the premises; but the claimant shall not have judgment for his claim, or for any part thereof, unless he shall establish the same by proof satisfactory to the court; *Provided*, That any Indian or Indians interested in the proceedings may appear and defend, by an attorney employed by such Indian or Indians with the approval of the Commissioner of Indian Affairs, if he or they shall choose so to do.

SECTION 5. That the said court, shall make rules and regulations for taking testimony in the causes herein provided for, by deposition or otherwise, and such testimony shall be taken in the county where the witness resides, when the same can be conveniently done, and no person shall be excluded as a witness because he is a party to or interested in said suit, and any claimant or party in interest may be examined as a witness on the part of the Government; that the court shall determine in each case the value of the property taken or destroyed at the time, and place of the loss or destruction, and, if possible, the tribe of Indians or other persons by whom the wrong was committed, and shall render judgment in favor of the claimant or claimants against the United States, and against the tribe of Indians committing the wrong, when such tribe can be identified.

In considering the merits of claims presented to the court, any testimony, affidavits, reports of special agents or other officers, and such other papers as are now on file in the departments or in the courts, relating to any such claims, shall be considered by the court as competent evidence and such weight given thereto as in its judgment is right and proper: *Provided*, That all unpaid claims which have heretofore *been examined, approved and allowed by the Secretary of the Interior*, or under his direction, in pursuance of the act of Congress making appropriations for the current and contingent expenses of the Indian Department and for fulfilling treaty stipulations with various Indian tribes, for the year ending June thirtieth, eighteen hundred and eighty-six, and for other purposes, approved March third, eighteen hundred and

eighty-five, and subsequent Indian appropriation acts, *shall have priority of consideration by such court*, and judgments for the amounts therein found due shall be rendered, unless the claimant or the United States shall elect to re-open the case and try the same before the court, in which event the testimony in the case given by the witnesses and the documentary evidence, including reports of Department agents therein, may be read as depositions and proofs: *Provided*, That the party electing to re-open the case shall assume the burden of proof.

SEC. 6. That the amount of any judgment so rendered against any tribe of Indians *shall be charged against the tribe by which*, or by members of which, the court shall find that the depredation was committed, and shall be *deducted and paid* in the following manner: First, *from annuities due said tribe from the United States*; second, if no annuities are due or available, then from any other funds due said tribe from the United States, arising from the sale of their lands or otherwise; third, if no such funds are due or available, then from any appropriation for the benefit of said tribe, other than appropriations for their curreut and neccessary support, subsistence and education; and, fourth, if no such annuity, fund, or appropriation is due or available, then the amount of the judgment shall be paid from the Treasury of the United States: *Provided*, That any amount so paid from the Treasury of the United States shall remain a charge against such tribe, and shall be deducted from any annuity, fund or appropriation hereinbefore designated which may hereafter become due from the United States to such tribe.

SEC. 7. That all judgments of said court shall be a final determination of the causes decided and of the rights and obligations of the parties thereto, and shall not thereafter be questioned unless a new trial or rehearing shall be granted by said court, or the judgment reversed or modified upon appeal as hereafter provided.

SEC. 8. That immediately after the beginning of each session of Congress the Attorney-General of the United States shall transmit to the Congress of the United States a list of all final judgments rendered in pursuance of this act, in favor of claimants and against the United

States, and not paid as hereinbefore provided, which shall thereupon be appropriated for in the proper appropriation bill.

SEC. 9. That all sales, transfers, or assignments of any such claims heretofore or hereafter made, except such as have occurred in the due administration of decedents' estates, and all contracts heretofore made for fees and allowances to claimants' attorneys, and hereby declared void, and all warrants issued by the Secretary of the Treasury, in payment of such judgments, shall be *made payable* and delivered only to the claimant *or his lawful heirs*, executors or administrators or transferee under administrative proceedings, except so much thereof as shall be allowed the claimants' attorneys by the court for prosecuting said claim, which may be paid direct to such attorneys, and the allowances to claimant's attorneys shall be regulated and fixed by the court at the time of rendering judgment in each case and entered of record as part of the findings thereof; but in no case shall the allowance exceed fifteen per cent. of the judgment recovered, except in case of claims of less amount than five hundred dollars, or where unusual services have been rendered or expenses incurred by the claimant's attorney, in which case not to exceed twenty per cent. of such judgment shall be allowed by the court.

SEC. 10. That the claimant, or the United States, or the tribe of Indians, or other party thereto interested in any proceedings brought under the provisions of this act, shall have the same rights of appeal as are or may be reserved in the Statutes of the United States in other cases, and upon the conditions and limitations therein contained. The mode of procedure in claiming and perfecting an appeal shall conform, in all respects as near as may be, to the statutes and rules of court governing appeals in other cases.

SEC. 11. That all papers, reports, evidence, records and proceedings now on file or of record in any of the departments, or the office of the secretary of the Senate, or the office of the Clerk of the House of Representatives, or certified copies of the same, relating to any claims authorized to be prosecuted under this act, shall be furnished to the court upon its order, or at the request of the Attorney-General.

SEC. 12. To facilitate the speedy disposition of the cases herein provided for, in said Court of Claims, there shall be appointed, in the manner proscribed by law for the appointment of Assistant Attorney-Generals, one additional Assistant Attorney-General of the United States, who shall receive a salary of twenty-five hundred dollars per annum.

SEC. 13. That the investigation and examinations, under the provisions of the acts of Congress heretofore in force, of Indian depredation claims, shall cease upon the taking effect of this act, and the unexpended balance of the appropriation therefor shall be covered into the Treasury, except so much thereof as may be necessary for disposing of the unfinished business pertaining to the claims now under investigation in the Interior Department, pending the transfer of said claims and business to the court or courts herein provided for, and for making such transfers and a record of the same, and for the proper care and custody of the papers and records relating thereto.

Approved March 3, 1891.

BRIEF.

I.

The claim having been allowed by the Secretary of the Interior, his finding, in the absence of new testimony, was conclusive, as to the *quantum* of damages sustained, and judgment for the amount therein found should have been rendered. (See Sec. 4, of the Act of 1891, Laws of the United States, of 1885, p. 376; Act of March 3, 1885). The election to reopen by the Government placed upon the Government the burden of proof, and in the absence of new testimony the allowance of the Secretary of the Interior was final.

There is nothing in Leighton's case, 161 U. S. 291, inconsistent with this, as there the claimant elected to reopen for the sole purpose of increasing the allowance, and introduced additional testimony, and it was developed that a jurisdictional fact was wanting. Here, the only issue was as to the amount of damages for an admitted depredation.

II.

The damages found by the Secretary of the Interior were the damages actually sustained by the plaintiff from the Indian depredation.

Price vs. United States, 33 Ct. of Cl., 106.

Eaton vs. R. R. Co., 51 N. H., 504.

McAfee vs. Crofford, 13 How., 447.

Hale on Damages, p. 43.

Railroad Co. vs. Kellog, 94 U. S., 469.

The term "consequential," as applied to these damages, is essentially misleading. They were in no sense remote.

1 Sedwick on Damages (8th Ed.) Secs. 110 and 124 and 133.

Derry vs. Fletcher, 118 Mass., 131.

Griffin vs. Colver, 16 N. Y., 489, 491.

III.

The Act of 1891 and the Act of 1885 must be construed together, and the words "taken and destroyed" in the Act of 1891, must be construed as the equivalent of "damaged or destroyed" in the Act of 1885.

Valk vs. United States, 28 Ct. of Claims, 241.

Valk vs. United States, 29 Ct. of Claims, 62.

Swope vs. United States, 33 Ct. of Claims, 223.

Friend vs. United States, 29 Ct. of Claims, 425.

Johnson vs. United States, 160 U. S., 550.

IV.

The Court of Claims erred in holding that the Act of March 3, 1891, limited the jurisdiction of the court in the allowance of damages from the depredation to cases of total loss or annihilation; but on the contrary the words "taken or destroyed" were used in a broad and comprehensive sense, including the damages *necessarily* resulting to property from depredation.

Pumpelly vs. Green Bay Co. 13 Wall., 166.

Eaton vs. R. R. Co., 51 N. H., 504.

Story vs. N. Y. El. R. R. Co., 90 N. Y., 122.

Cooley on Const. Limitations (2d Ed.), p. 545.

In Re Chestnut Street, 118 Pa. St., 593.

Spencer vs. R. R. Co., 23 W. Va., 415.

Jones vs. Erie R. R. Co., 151 Pa. St., 46.

Railway Co. vs. Minnesota, 134 U. S., 456.

V.

The purpose of the statutes of 1891 was remedial, to afford a form for the adjudication of claims, giving indemnity for depredations where the injured party was not at fault, and the construction of the Court of Claims in the case at bar defeats the primary purpose of the enactment.

United States and the Sioux Nation vs. Northwestern Stage and Transportation Co., 164 U. S., 686.

United States vs. Gorham, 165 U. S., 316.

Corralitos Stock Co. vs. United States, 33 Ct. of Cl., 342.

Salios vs. United States, 32 Ct. of Claims, 68.

23 Am. & Eng. Ency. of Law (1st Ed.), p. 319, p. 322, *et seq.*

Endlich on Interpretation of Statutes, Secs. 73 and 103.

ARGUMENT.

I.

The question first presented by this record is the status of this claim before the Court of Claims as one "examined, approved and allowed" by the Secretary of the Interior, the Government electing to reopen thus assuming the burden of proof, but offering no evidence in support thereof.

Under Section 1 of the Act of 1891, jurisdiction is conferred upon the Court of Claims "to inquire into and "finally adjudicate, in the manner provided in the act, all "claims in the following classes, namely: First. All "claims for property of citizens of the United States "taken or destroyed by the Indians belonging to any tribe, "band or nation in amity with the United States, without "just cause or provocation on the part of the owner or "agent in charge, and not returned or paid for. Second. "Such jurisdiction shall also extend to all cases which "have been examined and allowed by the Interior Depart- "ment, and *also to such cases as are authorized to be exam- "ined* under the act of Congress making appropriations "for the current and contingent expenses of the Indian "Department, and for fulfilling the treaty stipulations "with the various Indian tribes for the year ending June "30, 1886, and for other purposes, approved March 3, "1885, and under subsequent acts; subject, however, to "the limitations hereinafter provided."

Section 4 of the same act provides as follows:

"* * * Provided, that all the unpaid claims which "have heretofore been examined, approved and allowed "by the Secretary of the Interior, or under his jurisdic- "tion, in pursuance of the act of Congress making appro- "priations for the current and contingent expenses of the "Indian Department, and for fulfilling treaty stipulations "with the various Indian tribes, for the year ending June "30, 1886, and for other purposes, approved March 3,

"1885, and subsequent Indian appropriation acts, shall "have priority of consideration by such court, and *judg.* "*ments for the amounts therein found due shall be rend-* "*ered*, unless either the claimant or the United States "shall elect to reopen the case and try the same before "the court, in which event the testimony in the case given "by the witnesses, and the documentary evidence, includ- "ing the reports of department agents therein, may be "read as depositions and proofs; provided, that the party "electing to reopen the case shall assume the burden of "proof."

The Act of March 3, 1885, is thus explicitly referred to, and thus incorporated with the Act of 1891. The sec tion bearing upon investigation of Indian depredation claims is as follows (Laws of United States of 1885, p. 376):

"For the investigation of certain Indian depredation "claims, ten thousand dollars, and in expending same the "Secretary of the Interior shall cause a complete list of "all claims heretofore filed in the Indian Department, and "which have been approved in whole or in part, and now "remain unpaid, and also all such claims as are pending, "but not yet examined, on behalf of citizens of the United "States, on account of depredations committed, charge- "able against any tribe of Indians, by reason of any "treaty between such tribe and the United States, includ- "ing the name and address of the claimants, the date of "the alleged depredation, by what tribe committed, the "date of examination and approval, with a reference to the "date and clause of the treaty creating the obligation for "payment, to be made and presented to Congress at its "next regular session; and the Secretary is authorized "and empowered, before making such report, to cause "such additional investigation to be made, and such "further testimony to be taken as he may deem necessary "to enable him to determine the kind and value of all "property *damaged or destroyed* by reason of the depre- "dations aforesaid, and by what depredations were com- "mitted, and his report shall include his determination "upon each claim, together with the names and resi- "dences of witnesses, and the testimony of each, and

"also what funds are now existing or to be divided by "reason of treaty, or other obligation, out of which the "same should be paid."

As found by the Court of Claims the claims of Miller and Thompson were pending in the Department of Interior at the time this Act of 1885 was passed. The Secretary under this act was authorized and empowered to investigate this and other claims and to determine the amount and value of all the property damaged or destroyed. He did investigate and did determine from the evidence the amount of damage in this case, and it is admitted by the court that this damage was established by the undisputed evidence. The Act of 1891 gives this class of cases priority and directs that judgments for the amounts found due shall be rendered, unless the case shall be reopened, and the burden of proof is cast upon the party reopening.

It is true that this court held in the case of Leighton vs. United States, 161 U. S., 291, where the claimant reopened the case in the Court of Claims, that it appeared upon such reopening that the Indians committing the depredation did not belong to a tribe at amity with the United States, and that therefore an essential jurisdictional fact was wanting, which compelled the court to dismiss the claim. So here, if it had appeared on the Government's or claimants' reopening the case, that the Osage Indians were not at amity with the United States, or that the claimants were not citizens, then that case would have been in point. But in the case at bar, no such question is presented. The court, in the second clause of the first section of the Act of 1891, was given jurisdiction to inquire into and finally adjudicate all cases which had been examined and allowed by the Interior Department, and was empowered to render judgment for the amounts awarded by the Secretary, unless on the reopening of the case new evidence should be adduced, or, as in the Leighton case, some jurisdictional defect should be

developed. It is true the Court of Claims bases its conclusion upon what it calls a want of jurisdiction, but clearly the measure of damages to property for an admitted depredation was not jurisdictional in the sense that the citizenship of the claimant, or the state of amity of the tribe, were clearly jurisdictional.

But discussion upon this point—whether this matter of the measure of damages could be jurisdictional in the case of a claim found and allowed by the secretary—is really conclusively answered by the express reference in the Act of 1891 to the Act of March 3, 1885, which is thus, by reference, incorporated with the Act of 1891. By this Act of 1885, the secretary was directly authorized and empowered to determine the kind and value of all property "*damaged* or destroyed." The secretary was therefore authorized to investigate and determine just what he did investigate and determine, to-wit: the actual damages to the property of complainants, sustained by the depredation.

It certainly will not be seriously contended that the Act of 1891 is to be construed as precluding the Court of Claims from giving judgment for damages for an admitted depredation, which the secretary, under the Act of 1885, was authorized and empowered to ascertain and award.

Even then, if we concede, which we do not, that the words "taken or destroyed" in the Act of 1891 are to be construed in the narrow and technical sense adopted by the Court of Claims, this canstruction can have no application to the claims for the damages awarded by the secretary under the express authorization and direction of the Act of 1885.

It will be observed that the Court of Claims in its review of the Indian claim legislation entirely overlooked the significant language of the Act of 1885.

II.

We do not concede, however, that there is any warrant for the narrow and technical construction given by the Court of Claims to the words "taken or destroyed," as to any claims under the act of 1891. It is admitted by the Court below, in its opinion, that the damages found by the Secretary were the damages actually sustained by the claimant from this depredation. The theory of the court below is fully stated in the following excerpt from its opinion, (Rec., p. 10):

"If this were a proceeding at common law against "an ordinary wrongdoer in the form of an action *ex* "*delicto*, the right to recover to the full extent of the "injury inflicted, including direct and consequential dam- "ages, would be clear and unquestionable; but it being a "proceeding under a *statute*, the phraseology of which "limits the extent of the recovery, and the consequent "right of recovery, the rule is different. The property "actually taken in the depredation was the oxen, and the "damages incident to the rest of the property were the "*consequential* results of such taking."

It is thus conceded, as it must be, that the loss, though consequential, was proximate, and recoverable in a common law action of *tort*. As to the use of this word "consequential," in reference to damages, it is well said by the Supreme Court of New Hampshire in the leading case of Eaton vs. R. R., 51 N. H. 504, that it merely introduces an equivocation into the discussion. The term is used sometimes as to mean damage that is so remote as not to be actionable, and sometimes damage which, while not direct or immediate, is yet sufficiently proximate to be actionable. An interesting illustration is found in McAfee vs. Crofford, 13 How. 447. This was a suit against defendant for abducting plaintiff's slaves. It was proved that the male slaves were employed in cutting cord wood and supplying Crawford's wood yard. He

had at the time of the trespass, it was proved, from 1,800 to 2,000 cords of wood cut on the low ground back of the river, which was worth $2.00 per cord, and sold at the yard for $2.50. The hauling cost fifty cents per cord. The river became swollen by rain, and having no hands to remove the wood to the yard much of it was carried off by the flood, and what remained was so injured by being under water as to make it unsalable. Having no hands to attend to the crops the horses, mules and other stock of the neighborhood broke into the corn fields and destroyed a large part of it. The Court said:

McLean J.: "The loss of the services of the slaves "by the trespass necessarily resulting from the abduction "of a part of them, and driving off the others, are "clearly within the rule of damages in the trespass, and "we think the loss of the cord wood as proved, and the "injury to the corn crop, were also within it.

" * * * The question was fairly submitted to "the jury, whether under the facts and circumstances "proved, the injury to the corn crop resulted from the "loss of the hands. This was a matter of fact for the "jury, whether the fence of the plaintiff was good or bad; "if by reason of the loss of the slaves the breaches in "the inclosure could not be repaired, or the plaintiff was "unable to guard the fields, as was his custom, was an "inquiry for the jury; and in making up their verdict "they must have considered the facts and circumstances "connected with this branch of the case.

"The same remarks apply to the cord wood. Had "the plaintiff not been deprived of his hands, he might "have removed, sold or in some other manner secured the "wood from being flooded off by the flood. In regard "to the corn and wood, if the damage was a consequence "which necessarily followed the loss of the hands, the "plaintiffs in error were liable."

See Hale on Damages, p. 43.

In the language of Sedgwick on Damages (8th Ed.) Vol. 1, Sec. 110: "All remote damages are consequen-

"tial, but all consequential damages are not necessarily "remote. It is not consequenttial but remote damages which are excluded. Certain consequential damages are "always proximate." (See Sedgwick, Sec. 124.)

The test is, was the loss the natural consequence to be anticipated from the wrong? Upon the facts at bar, there can be no question. The only use of the teams was to transport the merchandise to a market. In the wilderness the merchandise was valueless. When the means of transportation was destroyed, the value of the property was gone. This was not speculative, remote or uncertain damages in any sense, but it was the certain consequence, naturally and inevitably to be anticipated.

Where plaintiff has been deprived of machinery or other means of carrying on his business, he may recover for the loss of business, if such loss naturally follows.

See 1st Sedgwick on Damages, 8th Edition, Section 133.

So loss is recoverable on account of the deprivation of the means of protection to person and property.

Derry vs. Fletcher, 118 Mass., p. 131.

The same principle is illustrated by the frequent application of the doctrine in suits against carriers, for delay in delivery, where it is held that plaintiff may recover compensation for decline in market value during time of delay.

See cases cited in 1 Sedgwick, Section 135.

So it is well settled that gain prevented is ground for compensation *i. e.* profits which would have been realized but for defendant's wrong. Such damages when clearly

established, are not speculative, but held to be the natural consequence of the wrongful act.

See Griffin vs. Colver, 16 N. Y., 489, 491.

The owner of goods may always recover the market price of goods at the place where he should have had them, and it is immaterial if profits are included in this aggregate price at the place of delivery.

The rule of damages under the facts of the case at bar must be the same as would be applied if a suit had been brought against the parties who committed the depredation; that is to say, the natural consequences of the wrongful act. If the wagons and merchandise had been abandoned and wholly lost in consequence of the loss of the means of transportation, the full value at the place to which they were being transported would have been the measure of damages, which value would have included the profit which claimants would have realized but for the wrongful act. This is the rule which is constantly applied in cases against railways. There is nothing speculative or contingent about it. It necessarily follows that whatever they did lose in thus being deprived of the means of transportation to the market, is just as recoverable as the value of the oxen themselves.

It follows, therefore, that the damages claimed, *while consequential*, are the natural and proximate consequence of the wrongful act, and therefore, are recoverable as such damages are always recoverable. They are even recoverable in actions for breach of contract where the consequences, in the nature of things, must have been brought to the knowledge of the party against whom they are claimed. A *fortiori*, they are always recoverable in case of tort where they are not only the natural but the inevitable consequence of the wrongful act.

It is true, as said by this court in R. R. Co. v. Kellog, 94 U. S. 469, that there is an efficient intermediate cause, the resort of the sufferer must be to the originator of the independent cause. But in the case at bar the only intervention was the chance passing of a trader, to whom the complainants were compelled to sell on his own terms or leave their property abandoned in the wilderness. His intervention operated to *reduce* the loss, and had he not intervened there would have been a total loss.

It is unnecessary to cite other illustrative cases of these fundamental principles of the law of damages, which are really conceded by the court below.

III.

The question, as seen, is one of statutory construction. The Act of 1891 and the Act of 1885 must be construed together, and the words "taken or destroyed" in the Act of 1891 must be construed as the equivalent of "damaged or destroyed" in the Act of 1885.

We have already considered this statute of 1885 in connection with our first point as to the claims "examined, approved and allowed" by the Secretary of the Interior. But this reference to the Act of 1885 has a broader significance. The two acts must be construed as constituting but one statute, and, in fact, the Act of 1885 has been frequently referred to by the Court of Claims as furnishing a conclusive construction of the Act of 1891.

Thus in Valk v. United States, 28 Court of Claims, 241, the court said:

"The jurisdictional act of 1891, March 3rd, Chapter "538, which we are now considering, adopted the lan- "guage of the Act of 1885, to which it refers, and in our "opinion Congress intended to use therein the words 'cit- "izens of the United States' in the sense that has been "given by the Interior Department to the same words in

"the act of 1885 for the past six years, which, it must be "presumed, was known to Congress."

In Valk v. United States, 29 Court of Claims, 62, it was again held that the construction given by the Interior Department to the Act of 1885 was adopted by Congress in the Act of 1891.

In Swope v. United States, 33 Court of Claims 223, and in Friend v. United States, 29 Court of Claims 425, the Act of 1885 was referred to as showing conclusively that the Act of 1891 related only to property losses, and not to claims for personal injuries.

Thus in the Swope case, the Court uses this language:

"It is clear from the language of the Act of 1885 that "the quality of jurisdiction as recognized by the first "clause of the Act of 1891, is the same as that provided "in the Act of 1885."

So this court, in Johnson vs. United States, 160 U. S. 550, holds that no jurisdiction was conferred upon the Court of Claims by clause two of section 1, unless the claim was one which on March 3, 1885, had either been examined and allowed by the Department of the Interior, or was pending therein for examination, and the court says, p. 552:

"And the purpose of the second clause of the Act of "March 3, 1891, was to take the cases which on March "3, 1886, were pending in the department and *transfer* "*them in bulk* to the Court of Claims."

The two acts being thus essentially one act for the purpose of construction, what was the jurisdiction conferred upon theS ecretary by the Act of 1885? "The "Secretary is authorized and empowered before making "such report (*i. e.* to Congress) to cause such additional "investigation to be made, and such further testimony to "be taken, as he may deem necessary, to enable him to "determine the kind and value of all the property damaged

"or destroyed by reason of the depredations afore-"said, etc."

The Act of 1891 says "that all unpaid claims which "have heretofore been examined, approved and allowed "by the Secretary of the Interior or under his jurisdiction, "in pursuance of the Act of 1885, shall have priority of "consideration by such court, and *judgments for the "amount therein found due shall be rendered*, etc."

Is it not too clear for argument that the words "taken and destroyed" in the Act of 1891 meant "damaged or destroyed," as used in the Act of 1885, and that Congress so understood and intended? Is there anything to show that Congress intended to make any change in the law?

It has been held by the Court of Claims that the act of 1891 does not create any new liability against the Indians, but therein the United States assumed existing liabilities, which is wholly remedial, creating no new rights, but merely providing a forum for litigation. See Leighton vs. United States, 29 Court of Claims 220; Carralitos Stock Co. vs. United States, 33 Court of Claims 342.

This construction is enforced by the consideration that this claim would have been wholly barred by section 2, having occurred prior to July 1, 1865, except for the fact that it was then allowed or was pending before the secretary under the second clause of the first section.

IV.

Meaning of "Property Taken or Destroyed."

Under the constitutional provisions that property shall not be "taken" for the public use without compensation, it has frequently been held that consequential damages not actually entered upon is a "taking." The leading case on this subject is the decision of this court in Pumpelly vs. Green Bay Co., 13 Wall. 166, where it

is held that the backing of water so as to overflow the lands of an individual, or in the superinduced addition of water, earth, sand or other material or artificial structure placed on land, though done under statutes authorizing it for the public benefit, is such a "taking" as by the constitutional provision demands compensation. The court says:

"The argument of the defendant is that there is no "taking of the land within the meaning of the constitu- "tional provision, and that the damage is a consequential "result of such use of a navigable stream as the govren- "ment had a right to for the improvement of its naviga- "tion. It would be a very curious and unsatisfactory "result that in considering a provision of a constitutional "law, always understood to have been adopted for the "protection and security of the rights of the individual as "against the rights of the Government, and which has "received the commendation of jurists, statesmen and "communities as applying the just principles of the com- "mon law on that subject beyond the power or ordinary "legislation to change or control them, it should be held "that if the Government refrains from the absolute conver- "sion of real property to the use of the public, it can "destroy its value entirely, can inflict irreparable and "permanent injury in extent, can, in effect, subject it to "total destruction, without making any compensation, "because in the narrowest sense of that word it is not "taken for the public use."

The court concedes that some of the state decisions have gone to the uttermost limit of sound judicial construction, and in some cases beyond it. There is nothing in the case of Transportation Co. vs. Chicago, 99 U. S., 635, inconsistent with the principle established in Pumpelly vs. Green Bay Co., as in this case it was held there was no invasion of the property rights of the claimant. A very strongly reasoned case is that of Eaton vs. R. R. Co., 51 N. H., 504. There the court, citing the well-

known definition of Austin that the right of property is the right of indefinite user and exclusion, says:

"From the very nature of these rights of user and "exclusion, it is evident that they cannot be materially "abridged without *ipso facto* taking the owner's property. "If the right of indefinite user is an essential element of "absolute property or complete ownership, whatever "physical interference annuls this right takes property, "although the owner may still have left to him valuable "rights in the article of a more limited and circumscribed "nature. He has not the same *property* that he formerly "had."

The court concludes, speaking of the misleading use of the words "consequential damages:"

"We are not alone in the opinion that the term con- "sequential damages has been misapplied in some of the "discussions of this constitutional question. (See Criti- "cisms of Miller, J., in Pumpelly v. Green Bay Co., 13 "Wall, p. 180; Paine, J., in Alexander v. Milwaukee, "16 Wisc. 248, p. 258; Sutherland, J., in People v. "Kerr, 37 Bar. (N. Y.) pp. 403, 408; and we think that "the confusion thus engendered will account for some "erroneous decisions. If this most ambiguous expression "is to be used at all in this connection, the meaning "attached to it should always be clearly defined, as is "done in Pierce on American Railroad Law, p. 173."

See also Story v. N. Y. El. R. R. Co., 90 N. Y. 122.

As stated by Judge Cooley on Constitutional Limitations (2d Ed.), p. 545:

"Any injury to the property of an individual which "deprives the owner of the ordinary use of it is equiva- "lent to a taking, and entitles him to compensation. "* * * So a partial destruction or diminution of value "of property by an act of government which directly, "and not merely incidentally, affects it, is to that extent "an appropriation."

See also *in re* Chestnut street, 118 Pa. St. 593;

Spencer v. R. R. Co., 23 W. Va. 415, citing Grand Rapids Booming Co. v. Jarvis, 30 Mich. 308; Crocker v. N. Y., 15 Fed. Rep. 405.

So the word "destroy" does not necessarily mean the physical annihilation of property. The destruction of all possible means of beneficial enjoyment or use of property is a destruction of property. Property is destroyed, although not attached directly, when the result of the act is to prevent its use. See Jones v. Erie R. R. Co., 151 Pa. St. 46.

Property, in the legal sense, consists not in the physical thing, but in the sum of the beneficial rights in the thing, the right of indefinite user. Thus the property rights of the claimants in their merchandise and teams must be construed as an entirety. Without the means of transportation to a market their merchandise was without value. The loss of the teams involved the taking and destruction of the value of the merchandise. When the teams were gone the value of the merchandise in transportation was gone.

Suppose the chance trader meeting them in the wilderness, who bought the goods at his own price had not intervened and the merchandise had been abandoned in the wilderness, and thus wholly lost to the claimant, would that not have been a taking and destruction within the meaning of the act? The learned judge of the court below says:

"The effect of the raid was not to destroy or dam-
"age the property by diminishing its quality or its quan-
"tity, but had the consequential effect of diminishing its
"value by producing a condition, the effect of which was
"to decrease its commercial worth in precipitating its sale
"in a place where there was no market in the form of
"competition."

We quote these words as illustrating how completely the essential legal conception of value was overlooked.

Value is used in law, as in economics, in its commercial and competitive sense. The goods in the then wilderness were valueless. The only value they possessed was in connection with the means of transportation to a market. What is any property worth without a market?

Thus in Railway Company vs. Minnesota, 134 U. S., 456, this court held that the deprivation of the power to charge reasonable rates for the use of property, is a deprivation of the lawful use of property, and this in substance and effect is the takng of property. The merchandise which was being transported through the wilderness to a market was instantly deprived of its value when the means of transportation through the wilderness to the market was destroyed. The value thus destroyed was property. Without the means of transportation to a market, the merchandise was as valueless to the owners as the bag of gold found by Robinson Crusoe on his island was valueless to him. The Indians, by driving off the oxen, *destroyed* the *property* in the merchandise as effectively, as if they had burned the merchandise when they drove away the oxen.

"You take my house when you do take the prop
"That doth sustain my house; you take my life
"When you do take the means whereby I live."

V.

The purpose of this statute of 1891 was remedial, to afford a forum for the adjudication of claims, giving indemnity for depredations where the injured party was not at fault, and the construction of the Court of Claims in the case at bar defeats the primary purpose of the enactment.

The Act of 1891 is a remedial statute and should therefore be liberally construed to effect the purpose for which it was enacted. Thus in United States and The

Sioux Nation vs. Northwestern Stage and Transportation Co., 164 U. S., 686, it was held that the words "citizens of the United States" must be construed to include a corporation organized under State law, the court saying at page 689, that it must be ascertained from the nature of the remedy proposed to be effected by the Indian depredation act whether the words were used in the act in their general signification. The Act in question was a provision made by the United States as a guardian of the Indians, controlling as well their persons as their property, designed to make provision for the payment of the injuries committed by its wards. The court therefore held that it was proper to consider that corporations were within the purview of words as used in the "remedial act."

In United States vs. Gorham, 165 U. S., 316, the same effect is given to the remedial purpose of the Act in holding that judgment may be rendered against the United States alone, when the tribe of Indians to which the depredators belonged cannot be identified, and such inability is stated.

"The statute shall be so construed as to suppress the "mischief and advance the remedy. * * * The "scope of the act being ascertained, the words are to be "construed as including every case clearly within that "object if they can do so by any reasonable construction, "although they point primarily to another or more limited "class of cases."

See Endlich on Construction of Statutes; Section 103.

The opinion of the Court of Claims in its review of the Indian depredation legislation entirely overlooks, as already pointed out, the very significant language of the Act of 1885, which is directly referred to in the Act of 1891. The Act of 1834, 4th Statutes at Large, p. 731,

which seems to have been in force at the time of this depredation, uses the words "take, steal or destroy," and the United States, in the event of failure to get satisfaction from the Indian Nation, guaranteed to the party so injured an eventual indemnification. As illustrative of the purpose of these enactments, we here cite different treaties between the United States and various Indian tribes, including the Osages:

OSAGES—GREAT AND LITTLE.

Ratified April 28, 1810.

ARTICLE 4, p. 527 Revision of Indian Treaties (1873):

"With a view to quiet animosities which at present "exist between the inhabitants of the Territory of Louis-"iana and the Osage Nations, in consequence of the "lawless depredations of the latter, the United States do "further agree to pay to their own citizens the full value "such property as they can legally prove to have been "stolen or destroyed by the said Osages since the acqui-"sition of Louisiana by the United States, provided the "same does not exceed the sum of $5000.00."

ARTICLE 9, p. 508 R. of I. T., (1873):

"With a view to quiet the animosities which at "present exist between a portion of the citizens of Miss-"ouri and Arkansas and the Osage tribes, in consequence "of the lawless depredations of the latter, the United "States do furthermore agree to pay, to their own citi-"zens, the full value of such property as they can legally "prove to have been stolen or destroyed by the Osages "since the year 1808, and for which payment has not "been made under former treaties; provided the sum to "be paid by the United States does not exceed the sum "of $5000.00."

ARTICLE 6, p. 584 R. of I. T., (1873):

"The United States agrees to pay all claims against "the Osages for depredations committed by them against

"other Indians or citizens of the United States to an "amount not exceeding $30,000.00; provided that the "said claims shall be previously examined under the "direction of the president."

BLACKFOOT.

ARTICLE 2, p. 10 R. of I. T., (1873):

"The aforesaid tribes * * promise to be friendly "with all citizens thereof (U. S.) and to commit no dep- "redations or other violence upon such citizens, and "should any one or more violate this pledge * * the "property taken shall be returned, or in default thereof, "or if *injured* or destroyed, compensation may be made "by the Government out of the annuities."

CALAPOOIAS.

ARTICLE 6. Words "injured or destroyed" used as above, p. 22.

CHASTAS.

ARTICLE 8, p. 25, words "injured or destroyed used as above. Proclaimed April 10, 1855.

MAKHA TRIBE.

Treaty between the United States and Makha Tribe of Indians Proclaimed April 18, 1859.

ARTICLE 9, on p. 463, Revision of Indian Treaties (1873):

"The said Indians * * pledge themselves to "commit no depredations upon the property of such "citizens, and should any one or more of them violate this "pledge * * the property taken shall be returned, or "in default thereof, or if injured or destroyed compensa- "tion may be made by the Government out of their "annuities."

Treaty between the United States and the confederated triber and bands of Indians in middle Oregon, ratified March 8, 1859.

ARTICLE 7, p. 627, Revision of Indian Treaties (1873):

"The confederated bands * * pledge themselves "to commit no depredations on the property of said "citizens; and should any one or more of them violate "this pledge * * the property taken shall be returned, "or in default thereof, or if injured or destroyed, com- "pensation may be made by the Government out of their "annuities."

PONCAS.

Treaty between the United States and the Ponca tribe of Indians, ratified March 8, 1859.

ARTICLE 7, p. 664, Rev. of Indian Treaties:

PONCAS.

"The Poncas * * * pledge themselves * * "* to comit no injuries or depredations on their (citi- "zens of the U. S.) persons or property, nor on those of "members of any other tribe; but in case of such injury "or depredation full compensation, as far as practicable, "shall be made therefor out of their tribal annuities; the "amount in all cases to be determined by the Secretary "of the Interior."

QUI-NAI-ELTS.

Treaty with Qui-Nai-Elts, ratified March 8, 1859.

ARTICLE 8, p. 725, Rev. of Indian Treaties, (1873):

"The said tribes and bands * * * pledge them- "selves to commit no depredations on the property of such "citizens; and should any one or more of them violate "violate this pledge * * * the property taken shall be "returned or, in default thereof, or if injured or

"destroyed, compensation may be made by the Govern-"ment out of their annuities."

S'KALLAMS.

Treaty with S'Kallams, ratified March 8, 1859.

ARTICLE 9, p. 803, Rev. of Indian Stats, (1873):

Same provision as above.

Thus we have compensation provided for property "stolen or destroyed," "injured or destroyed," "all claims for depredations committed;" in the Act of 1885, property "damaged or destroyed," and in the Act of 1891, which was enacted, not to create new liability, but to provide for the final adjudication of existing claims, the words "taken or destroyed" are used.

The purpose of these treaties and the Indian depredaiion acts has uniformly been to maintain peace upon the frontier by guaranteeing indemnity or redress for depredations, provided the injured party was not at fault and did not attempt to obtain private satisfaction or revenge. Thus the title to the Act of 1834 was, "An Act to regulate Trade and Intercourse with the Indians and to Preserve Peace on the Frontier."

That construction should therefore be adopted which will best promote the purposes intended, and the words of a statute are to be best understood in the sense in which they best harmonize with the subject of the enactment and the object which the legislature had in view. See Endlich on Interpretation of Statutes, 73. Cited in reference to Indian depredation acts in Leighton vs. United States, 29 Ct. of Cl., 288, and affirmed by this court.

Is it not clear, therefore, that the words "taken or destroyed" in the Act of 1891 are intended to be used in their broad and comprehensive sense and intended to

include all cases of Indian claims then existing and not barred by limitation under the Act, and must be taken as equivalent to the words "injured or destroyed" and "damaged or destroyed" in former statutes and treaties?

This claim has now been pending before Indian Agencies, Congress, in the Interior Department and in the Court of Claims for over forty years. It was carefully investigated by the Indian Department, through its special agents, and the claim was examined, approved and allowed by the Secretary of the Interior, under the direction of Congress, before the passage of this act of 1891.

We submit, therefore, that the judgment of the Court of Claims was clearly erroneous, and that upon the conceded facts appellant is entitled to recover his full damages as found by the Secretary of the Interior as directed by the Act of 1885, and judgment should therefore be entered for the sum of six thousand eight hundred dollars ($6,800), being the damages so found by the Secretary of the Interior and admittedly sustained by claimant from said depredation, in lieu of the sum of four hundred dollars ($400) found by the Court of Claims.

F. N. JUDSON and
JOHN GOODE,
for Appellant.

No. 247.

Brief of Atty. Gen. (Thompson & Cotteral) for Appellees

Filed Mar. 30, 1899.

In the Supreme Court of the United States.

OCTOBER TERM, 1898.

WILLIAM M. PRICE, ADMINISTRATOR of the estate of Henry C. Miller, deceased, appellant,
v.
THE UNITED STATES AND THE OSAGE Indians, appellees.

No. 247.

BRIEF AND ARGUMENT FOR APPELLEES.

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BRIEF AND ARGUMENT FOR APPELLEES.

STATEMENT OF THE CASE.

The facts in this case, as shown by the record, are as follows:

In the year 1847 Henry C. Miller and P. W. Thompson, who were not partners, started from western Missouri to New Mexico with an ox train loaded with merchandise of the alleged value of $1300.

On the 26th of June, 1847, near the Arkansas River, in what is now the State of Kansas, Indians belonging to the Osage tribe took and drove away 32 head of oxen, the property of the appellant.

At the time of the taking, the oxen were being used by appellant's decedent in transporting his wagons and merchandise along the route aforesaid, and in consequence of the taking and driving away of said oxen he was compelled to abandon his trip and sell his merchandise and four wagons for the sum of $1,200.

The claim was presented to the Interior Department and allowed for the sum of ~~$7,800~~ $8,200, of which sum $6,800 was allowed to Miller and $1,400 was allowed to Thompson.

That allowance constituted the claim "allowed" under the Indian depredation act of March 3, 1891, and upon which the claimant in the court below was entitled to judgment unless such allowance was reopened, which action was taken by the defendants.

The finding of the Interior Department, as to the value of the property, was followed by the Court of Claims, showing that the value of the property of appellant's decedent was $6800, the merchandise and wagons being worth $———, and the value of the oxen $400.

The Court of Claims awarded judgment for the value of the oxen, but disallowed the claim for the value of the merchandise and the wagons, finding, as a conclusion of law—

> The petition as to the claim for goods and wagons belonging to claimant's decedent and disposed of as set forth in Finding II is dismissed for want of jurisdiction.

In their opinion (pp. 10, 11, 12) upon this point, Chief Justice Nott says:

> The statute of 1891 provides as its first and fundamental grant of power that the court shall

have jurisdiction, first, "All claims for property of citizens of the United States taken or destroyed by Indians belonging to any band, tribe, or nation in amity with the United States without just cause or provocation on the part of the owner or the agent in charge and not returned and paid for."

The depredation which Congress intended to afford a remedy for by the act of 1891 is limited by the words "taken or destroyed," and is, therefore, necessarily circumscribed by that limitation to property which has been absolutely lost, either by theft or destruction. The act was not intended to cover consequential damages which might have ensued to a claimant as an incident to the raid on his property and for which there might be a recovery against a wrongdoer at common law. The court, in the construction of that section of the statute, has confined the liability of the defendants to the value of the property actually taken or destroyed, and has not allowed consequential damages resulting from the commission of the depredation.

In the case of *Brice* v. *The United States and the Cheyenne and Arapahoe Indians* (32 C. Cls. R., 23) it is said, in reference to the act of 1834, "the Secretary of the Interior had no authority to adjust and allow a claim for consequential damages growing out of the taking of property, and was therefore confined to the consideration of the claim for the value of the mules alleged to have been stolen."

In this case, so far as the raid of the Indians affected the condition, the goods of claimants were untouched; they remained intrinsically, so far as condition is concerned, in the same state that they were antecedent to the raid and depredation of the defendant Indians.

The effect of the raid was not to destroy or damage the property by diminishing its quality or its

quantity, but had the consequential effect of diminishing its value by producing a condition the effect of which was to decrease its commercial worth in precipitating its sale at a place where there was no market in the form of competition.

They did not take or destroy the property of the claimant, but deteriorated its value, as the incidental and consequential result of their raid. The court decides that the claimant is entitled to recover the value of the oxen, but no allowance is made for the damages to the goods, for the reasons stated in the foregoing opinion.

The appellant urges:

First. That the case being one "allowed" under the act of 1886, and "preferred" by the terms of section 5 of the Indian depredation act of March 3, 1891, and entitled to judgment unless reopened. When reopened by the defendants, the burden of proof being upon the party reopening, judgment for the amount of the allowance shall be rendered, unless there is new testimony adduced overturning the prima facie case existing by reason of the allowance of the Secretary of the Interior.

Second. That the Court of Claims erred in holding that the act of March 3, 1891, limits the jurisdiction of the court to cases or claims for "property taken or destroyed."

Appellant contends that such *damages* as his decedent suffered is within the terms of the act giving the court jurisdiction to inquire into and finally adjudicate * * * all claims for property * * * taken or destroyed by Indians, etc.

I.

We think the reasoning of appellant upon the first question is unsound and not in harmony with either the

language or intent of section 5 of the act of March 3, 1891, wherein it is—

> *Provided*, That all unpaid claims which have heretofore been examined, approved, and allowed by the Secretary of the Interior, or under his direction, in pursuance of the act of Congress making appropriations for the current and contingent expenses of the Indian Department and for fulfilling treaty stipulations with various Indian tribes for the year ending June 30, 1886, and for other purposes, approved March 3, 1885, and subsequent Indian appropriation acts, shall have priority of consideration by such court, and judgments for the amounts therein found due shall be rendered, unless the claimant or the United States shall elect to reopen the case and try the same before the court, * * * and
>
> *Provided*, That the party electing to reopen the case shall assume the burden of proof.

The last proviso of that section relates to the determination of the *facts* of the case and not the law.

Defendants reopened the case and presented the same as if the question was raised by demurrer.

They admitted the facts that a loss had been suffered by the act of the defendant Indians, but contended under the law of the case, as to a portion of the claim, that the court had no jurisdiction.

This question might have been raised by a plea to the jurisdiction of the court, but under the liberal rules of the Court of Claims the defense may be made under the plea of general issue. The practice is optional with the defendants.

The court has permitted the law of the case to be settled in advance of an election to reopen. (*Moore* v. *United*

States, 32 C. Cls. R., 593; *McKee* v. *United States*, 33 C. Cls. R., 99.)

In re Mares (29 C. Cls. R., p. 197), which was an allowed claim, the defendants moved to dismiss claimant's election to reopen upon the ground that the Secretary of the Interior had no authority to allow the claim.

That motion was allowed by the court.

In re Labadie, administrator, which was an allowed claim, the court permitted the defendants to plead set-off without reopening the case. (31 C. Cls. R., p. 436; 32 C. Cls. R., p. 368.)

This practice of the Court of Claims is sound. Defendants have a right to determine the law of the case in advance of even an election to reopen.

Having this right, it necessarily follows that after a case is reopened they have a right to a determination of the law of the case before any consideration can be given to the facts.

It is thought that the reply to this contention first made under this head is a complete answer, assuming that the burden of proof carries with it nothing more than the onus as to the facts.

Upon the facts there is no controversy. The commission of the depredation is alleged. The taking and driving away of decedent's oxen, the sale of his wagons and goods for the sum shown, and their value as found by the Secretary of the Interior are all admitted facts.

Liabilities under the act of March 3, 1891, and the jurisdiction of the court to "inquire into and finally adjudicate" a claim for depredation, are questions of law, for determination by the court, in which determination

the character of the case, whether original or "allowed," "preferred" or unpreferred, reopened or standing upon the allowance made by the Interior Department, is wholly immaterial.

If the law of the case is with the appellants, the claim having been reopened by the defendants, and no new evidence having been adduced to overturn the finding of the Secretary upon the facts of the case, he should have judgment in the court below.

If this contention be sound, the main and only question presented by the record is under the second subdivision of the case.

II.

The Indian depredation act of 1891 provides for payment for property "*taken* or *destroyed*" by Indians belonging to any band, tribe, or nation, etc.

The act of 1885 provides for investigation of claims for property "*damaged* or *destroyed*."

The defendant Indians contend that the change made in the act of 1891 from that of the act of 1885 is significant; that the Indians were not to be thereafter required to pay for mere damages to property, *consequential* or *otherwise*, but that only the property actually "*taken*" or actually "*destroyed*" by Indians should be paid for, and the jurisdiction of the court was so limited.

The word "taken" in the act of 1891 means that there has been a corporeal taking hold of and carrying away of the property itself and appropriating the same to the use of the taker, so that the Indians who thus took the property got the use and benefit of it.

Because the Indians actually took and carried away the oxen belonging to the appellant's decedent does not prove that the same Indians took any other property from him.

The allegations of the petition in the court below, found in this record, page 3, are that on the 24th day of June, 1847, the Indians made an attack on the stock belonging to appellant's decedent, wounding one yoke of oxen, and that on the 26th day of the same month said Indians "then and there took from and drove off twenty and one-half (20½) yoke of oxen, belonging to Henry C. Miller and Phillip W. Thompson." And in a prior allegation in the same petition (p. 3) it is stated that said parties had in their said train 22 yoke of oxen. It is not shown that there was any attempt on the part of the Indians to take or carry away or destroy any of the property of the appellant's decedent except the oxen, and in no way did they interfere with the wagons or merchandise.

The contention of the appellant is, not that the Indians actually took the wagons and merchandise, nor that they destroyed the same, but that the taking of the oxen resulted in preventing him from getting his merchandise to market, thereby depreciating the value of it.

In support of this contention, appellant's brief cites case of *Pumpelly* v. *Green Bay Co.* (13 Wallace, 166), wherein it is shown that there was actually a *taking* of the land without just compensation. Reference is also made to Cooley's Constitutional Limitations, wherein it is asserted that "any injury to the property of an individual which deprives the owner of the ordinary use of it is equivalent to a taking."

It is respectfully submitted that no general rule of construction of the Constitution is applicable to the construction of the Indian depredation act of March 3, 1891.

It is an act passed to meet a peculiar condition, affording a special remedy for such condition, and is to be construed in strict accordance with the conditions it was framed to meet.

Just what application, therefore, the fine distinctions of the meaning of the word "taking," discussed in the said cited cases, has to the meaning of the word "taken" in the Indian depredation act is not clear, and especially so since it is *not* claimed in this case that there was a taking in any sense of the wagons or merchandise.

III.

Having discussed the meaning of the word "taken," as used in the Indian depredation act, let us now consider the word "destroyed," as used in said act. The sentence in which that word is found is as follows: * * * "For property of citizens * * * destroyed by Indians," etc., * * * .

The law in question is not at all ambiguous, but on the other hand it is clear and not open to debate. It is remedial in its nature, but remedial only to the extent of the words in the act and is restrictive accordingly.

This court said in the case of *Leighton* v. *The United States et al.* (161 U. S. R., p. 291):

> * * * Before any judgment should be rendered binding the United States, it is a familiar and settled law that the statute claimed to justify such judgment should be clear and not open to debate.

In *Marks* v. *The United States* (U. S. R., 161, p. 297), Mr. Justice Brewer, for the Supreme Court, said:

> Again, as often affirmed in the decisions of this court, the Indians are, in a certain sense, the wards of the United States, and the legislation of Congress is to be interpreted as intended for their benefit. * * *

In conferring jurisdiction upon the Court of Claims for the determination and adjudication of the rights of claimants for depredations committed by Indians many limitations and restrictions are to be found in the act, and the Court of Claims, as well as this court, has uniformly held to a strict construction of said act.

The right to recover has been limited in the first clause of the act to citizens of the United States. Amity is a condition of both the jurisdiction of the court under the first clause of the act and as a defense under the second.

Congress evidently intended also to limit the right of recovery to claims for *property taken or destroyed.* If Congress had intended to open the jurisdiction of damage arising out of Indian depredations it would have said so in the act. The reasons for limiting the rights of claimant to claims for property taken or destroyed are manifold. In the first place the same measure of damages is not applicable to suits against the United States that finds place in controversies of this kind in suits between individuals. Again, Congress did not intend to leave open questions covering the vast domain of damages for the determination of the court, but rather to limit the court's jurisdiction, as was plainly done by the words employed in the act.

The Court of Claims has limited its jurisdiction to claims for property taken and destroyed in cases other than the one at bar. In *Swope* v. *The United States* (33 C. Cls. R., p. 223) and in *Friend* v. *The United States* (29 C. Cls. R., p. 425) the Court of Claims held that they had no jurisdiction over suits for damages by reason of personal injury.

If counsel may be permitted to make the statement (and this court is authorized to take judicial notice of matters of public record), the Court of Claims has uniformly refused to take jurisdiction for any claims other than those for property taken and destroyed. They have refused to allow for damage to crops where the same have been abandoned by reason of the hostile or unlawful acts of the Indians; they have refused to allow for expenses incident to the recovery of stock taken by the Indians. As has hereinbefore been stated, they have limited their jurisdiction to cases falling strictly within the language of the Indian depredation act of March 3, 1891.

In the claim in controversy the Indians did not *take* the wagons or merchandise. They did not use or carry away the same. They did not in any way change the corporeal existence of the property or interfere with appellant's possession of it.

The Indians did not destroy the corporeal property. The property remained intact in possession of appellant's decedent precisely as before the Indians had taken the oxen. How, therefore, can the Indians be held liable for profits or losses on merchandise which was neither "taken" nor "*destroyed?*"

There is no question of *damage* in the case. The act referred to eliminates "damages" from the consideration of the court.

Appellant's brief says that the act of 1885 is explicitly referred to in the act of 1891. So it is; but it is referred to to be repealed by a restriction upon the court's jurisdiction; and wherever the act of 1891 differs from that of 1885 the difference is material and significant, because it was determined to make it different. Damages, in their true sense, are not provided for in the Indian depredation act.

The Indian depredation act proceeds on the theory of making compensation for the property actually taken or actually destroyed.

It can in no case meet the actual damages sustained by the loser of the property, such as his inconvenience, loss of time, anxiety of mind, and gains prevented. The act was framed to treat only of those tangible things the value of which may be determined with reasonable certainty. All speculative matters are eliminated from consideration.

Once the door of speculation is opened, these claims would expand to unrecognizable proportions.

In the passage of this act there was no attempt to provide for profits or loss of profits of goods "taken or destroyed," but by the substitution of the word "taken," in the act of 1891 for the word "damaged" in the act of 1885, all speculative damages were discontinued.

It is much easier to expand the supposed value of a thing than the real value.

The value of the goods actually *taken* by the Indians

is great enough, without charging them up with the value of the goods they did not take.

It is enough to charge the Indians with the value of the goods they actually *destroyed*, and it is too much to charge them with the value of goods they did not destroy.

What a chance for speculation in this case!

Why did he not hire the trader (to whom he sold his goods for $1,200) to take his merchandise to Santa Fe? The trader bought them. He could have taken them for appellant.

Because appellant did not do what he might have done, because he did not buy transportation and save the value of his goods, is no reason why the Indians should be charged with his losses.

The Indian depredation act wisely and designedly eliminated the field of pure speculation, and fixed the sole right and remedy upon the goods and property actually taken or actually destroyed by Indians belonging to a tribe or band in amity with the United States.

The theories of damages so well set forth in appellant's brief are without application here. They belong to cases involving the subject-matter they treat. They do not fit an Indian depredation case under the act of March 3, 1891.

JOHN G. THOMPSON,
Assistant Attorney-General.

FRANK B. CROSTHWAITE,
Attorney for Defendant Indians.

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PRICE *v.* UNITED STATES AND OSAGE INDIANS.

APPEAL FROM THE COURT OF CLAIMS.

No. 247. Argued April 19, 1899. — Decided May 15, 1899.

Under the act of March 3, 1891, c. 538, giving the Court of Claims jurisdiction over claims for property of citizens of the United States taken or destroyed by Indians no jurisdiction is given to the court over a claim for merely consequential damages resulting to the owner of property so taken by reason of the taking but not directly caused by the Indians.

THIS case came on appeal from the Court of Claims. The matter of dispute is disclosed by the second and fourth findings of the court, which are as follows:

Second. "On the 26th day of June, 1847, near the Arkansas River, on the route from western Missouri to Santa Fé, at a place in what is now the State of Kansas, Indians belonging to the Osage tribe took and drove away 32 head of oxen, the property of said decedent, which at the time and place of tak-

ing were reasonably worth the sum of four hundred dollars ($400).

"At the time said oxen were taken they were being used by said decedent in the transportation of goods along the route aforesaid, and in consequence of such taking decedent was compelled to abandon the trip and to sell his portion of said goods and four (4) wagons belonging to him for the sum of one thousand two hundred dollars ($1200).

"The goods and wagons of said decedent at the time of the depredation were reasonably worth the sum of seven thousand six hundred dollars ($7600).

"Said property was taken as aforesaid without just cause or provocation on the part of the owner or his agent in charge and has not been returned or paid for."

Fourth. "A claim for the property so taken was presented to the Interior Department in June, 1872, and evidence was filed in support thereof."

Judgment in that court was entered for $400, (33 C. Cl. 106,) to review which judgment the petitioner appealed.

Mr. John Goode for appellant. *Mr. F. N. Judson* was on his brief.

Mr. Frank B. Crosthwaite for appellees. *Mr. Assistant Attorney General Thompson* was on his brief.

Mr. Justice Brewer, after stating the case, delivered the opinion of the court.

The fourth finding simply shows that a claim was presented to the Interior Department and evidence filed in support thereof. The petition alleges not merely the fact of the presentation of the claim and of the filing of evidence to sustain it, but also an award by the Secretary of the amount of $6800, a sum covering both the value of the property taken by the Indians and the consequential damages resulting therefrom. A demurrer by the defendants having been overruled, a traverse was filed, denying all the allegations of the petition.

Taking the pleadings with the findings we might justly assume that there had never been any award by the Secretary of the Interior, but only a presentation of a claim and evidence in support thereof; but we notice that the Court of Claims speaks of the award as though it was a fact found. We feel, therefore, constrained to consider the case on that basis.

The conclusions of the Secretary, both as to liability and amount, were placed before the court for consideration by the election of the defendants to reopen the case. This election opened the whole case. *Leighton* v. *United States*, 161 U. S. 291.

The liability of the defendants is not disputed. The single question presented is as to the amount which may be recovered. The value of the property taken was awarded, and the only question is whether the plaintiff was entitled, not merely to the value of that property, but also to the damages to other property which resulted as a consequence of the taking. The property which was not taken or destroyed, which remained in the possession of the plaintiff's intestate, which he could do with as he pleased, the title and possession of which were not disturbed, was, as the findings show, reasonably worth $7600. Because out in the unoccupied territory in which the taking of the oxen took place there was no market, and because he had no means of transporting the property not taken to a convenient market, he was subject to the whim or caprice of a passing traveller, and sold it to him for $1200. The loss thereby entailed upon him he claims to recover under the provisions of the statute of March 3, 1891, c. 538, 26 Stat. 851.

The right of the plaintiff to recover is a purely statutory right. The jurisdiction of the Court of Claims cannot be enlarged by implication. It matters not what may seem to this court equitable, or what obligation we may deem ought to be assumed by the Government, or the Indian tribe, whose members were guilty of this depredation, we cannot go beyond the language of the statute and impose a liability which the Government has not declared its willingness to assume. It is useless to cite all the authorities, for they are many, upon the proposition. It is an axiom of our jurisprudence. The Gov-

ernment is not liable to suit unless it consents thereto, and its liability in suit cannot be extended beyond the plain language of the statute authorizing it. See, among other cases, *Schillinger* v. *United States*, 155 U. S. 163, 166, in which this court said: "The United States cannot be sued in their courts without their consent, and in granting such consent Congress has an absolute discretion to specify the cases and contingencies in which the liability of the government is submitted to the courts for judicial determination. Beyond the letter of such consent the courts may not go, no matter how beneficial they may deem or in fact might be their possession of a larger jurisdiction over the liabilities of the government."

Now the jurisdiction given by the act of 1891 to the Court of Claims is over "all claims for property of citizens of the United States taken or destroyed by Indians," etc. So far as any property was taken or destroyed by the Indians the judgment of the Court of Claims awards full compensation therefor, and no question is made as to the judgment in that respect. The single contention of the plaintiff is that because of the taking of certain property the value of other property not taken or destroyed was, under the conditions surrounding the petitioner and such property, diminished. This diminution in value did not arise because of any change in its quality or condition, but simply because the petitioner left in possession of that property was, in consequence of the taking away of the means of transportation, unable to carry it to a place where its full value could be realized. In other words, the damages which he thus claims do not consist in the value of property taken or destroyed, but are those which flow in consequence of the taking to property which is neither taken nor destroyed. In brief, he asks consequential damages. Now, as we have said, we are not at liberty to consider whether there may not be some equitable claim against the Government or the Indians for such consequential damages. We are limited to the statutory description of the obligations which the Government is willing to assume and which it has submitted to the Court of Claims for determination. We may not enter into the wide question of how far an individual taking or destroying prop-

erty belonging to another may be liable for all the damages which are consequential upon such injury or destruction. If Congress had seen fit to open the doors of the court to an inquiry into these matters doubtless many questions of difficulty might arise, but as it has only declared its willingness to subject the Government to liability for property taken or destroyed we may not go beyond that and adjudge a liability not based upon the taking or destruction of property, but resulting from the destruction or taking of certain property to other property not taken or destroyed. Questions, such as arose in *Pumpelly* v. *Green Bay Co.*, 13 Wall. 166, as to the scope of constitutional limitations upon the right to take property without full compensation, are not pertinent to the present inquiry; for while if the court had free hand and could adjudge a liability upon the Government commensurate to the wrong done, one conclusion might follow therefrom; yet we are limited by the other fact that the liability of the Government to suit is a matter resting in its discretion, and cannot be enlarged beyond the terms of the act permitting it. Consequential damages to property not taken or destroyed are not within the scope of the act authorizing recovery for damages to property taken or destroyed.

We have thus far considered the case as though it were one *de novo* and in no way affected by prior proceedings in the Interior Department. As heretofore indicated, notwithstanding the limited scope of the findings, we think we ought in view of the opinion of the Court of Claims to consider the case in the attitude of one for which an award had been made by the Secretary of the Interior; that award including not merely damages for the property taken and destroyed but also what, as we have shown, were merely consequential damages. Here we are met by the contention of the plaintiff that larger jurisdiction is given to the Court of Claims in respect to matters thus determined by the Secretary of the Interior. Beyond the general jurisdiction given to the extent heretofore indicated by the quotation from the statute is this, expressed in the subsequent part of the same section:

"Second. Such jurisdiction shall also extend to all cases

which have been examined and allowed by the Interior Department and also to such cases as were authorized to be examined under the act of Congress making appropriations for the current and contingent expenses of the Indian Department, and for fulfilling treaty stipulations with various Indian tribes for the year ending June thirtieth, eighteen hundred and eighty-six, and for other purposes, approved March third, eighteen hundred and eighty-five, and under subsequent acts, subject, however, to the limitations hereinafter provided."

It is contended that in cases coming under this clause the Court of Claims may award all damages which the Secretary of the Interior has or might have given to the petitioner. Conceding for the purpose of the argument that this contention is justified, we cannot see that therefrom any new measure of liability is established, or, at least, none that will avail this petitioner. The act of March 3, 1885, c. 341, 23 Stat., 376, which provided for the investigation by the Interior Department of claims on account of Indian depredations, and under which it is alleged that the Secretary acted in making his award, authorized the Secretary "to determine the kind and value of all property damaged or destroyed by reason of the depredations aforesaid." The contention is that the terms "damaged" or "destroyed" enlarge the scope of the liability assumed by the Government. We are unable to perceive that this is of any significance in this case. The property left in the possession of the petitioner was neither damaged nor destroyed by the action of the Indians in taking away the other property. Its inherent intrinsic value was in no manner disturbed. The damages were not to the property, considered as property, but simply consequential from the wrong done, and consisted solely in the fact that the petitioner, wronged by the taking away of certain property, was unable to realize the real value of property not taken, damaged or destroyed. Nothing was done by the Indians to disturb the intrinsic value of the property left in possession of the petitioner. It remained his with full right of control and disposition, in no manner

marred or changed in value, and the sum of the injury results only from the fact that he could not remove it to a suitable market. The property, in itself considered, was neither taken, damaged nor destroyed. The only result was that his ability to make use of that value was taken away because his means of transportation were destroyed. The damages were, therefore, consequential, and not to the property itself. We do not perceive how, under the statute, the liability of the Government was enlarged by this fact.

The judgment of the Court of Claims is, therefore,

Affirmed.

MR. JUSTICE WHITE, MR. JUSTICE PECKHAM and MR. JUSTICE MCKENNA dissented.